

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

SONIA MARTINEZ, on behalf of  
J.T., a minor child,

Plaintiff,

v.

JO ANNE B. BARNHART, Commissioner  
of Social Security,

Defendant.

No. CV-04-3006-FVS

ORDER GRANTING PLAINTIFF'S  
MOTION FOR SUMMARY JUDGMENT,  
DENYING DEFENDANT'S MOTION  
FOR SUMMARY JUDGMENT, AND  
DIRECTING AN IMMEDIATE AWARD  
OF BENEFITS

**BEFORE THE COURT** are cross-motions for summary judgment, Ct. Rec. 9 and 12, noted for hearing without oral argument. Attorney D. James Tree represents Plaintiff. Special Assistant United States Attorney Leisa Wolf represents Defendant.

**BACKGROUND**

The facts were presented in the administrative transcript and the ALJ's decision, and will only be summarized here. At the time of the ALJ's decision, Plaintiff was twelve years old and had completed the fifth grade. He has done poorly in school and has undergone a number of evaluations performed by both independent doctors and his school.

On October 3, 2000, Plaintiff's mother, Ms. Martinez, protectively applied on Plaintiff's behalf for Child's Supplemental

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT, AND DIRECTING AN IMMEDIATE AWARD OF BENEFITS - 1

1 Security Income ("SSI") disability benefits for attention deficit  
2 hyperactivity disorder ("ADHD") and borderline intellectual  
3 functioning. The claim was denied initially and on reconsideration;  
4 a request for hearing was ultimately filed. An administrative  
5 hearing was held on May 30, 2002, and a supplemental hearing was held  
6 on November 20, 2002. Administrative Law Judge ("ALJ"), Edward P.  
7 Nichols, denied benefits on March 7, 2003. The Appeals Council  
8 denied Plaintiff's request for review. The Court now has  
9 jurisdiction to review the ALJ's decision denying benefits pursuant  
10 to 42 U.S.C. § 405(g).

11 **SEQUENTIAL ANALYSIS - DETERMINATION OF DISABILITY**

12 The three-step sequential evaluation applicable to juvenile  
13 claims for benefits is set forth in 20 C.F.R. § 416.924 et seq.  
14 (2000). At step one, the ALJ must determine whether the claimant has  
15 engaged in substantial gainful activity since the alleged onset of  
16 the disability. 20 C.F.R. §§ 416.924(a) and (b). At step two, the  
17 ALJ must determine whether the claimant suffers from a severe  
18 impairment or combination of impairments that are severe. 20 C.F.R.  
19 §§ 416.924(a) and (c). At step three, the ALJ must determine whether  
20 the claimant's "impairment(s) meets, medically equals, or  
21 functionally equals the listings". The impairment will medically  
22 equal a listed impairment "if the medical findings are at least equal  
23 in severity and duration to the listed findings." 20 C.F.R.  
24 § 416.924(d)(1) (2000). The impairment will be considered  
25 functionally equivalent if the claimant has marked limitation in two

1 areas or extreme limitation in one area. 20 C.F.R.  
2 § 416.926a(a)(2000). Functional equivalence may be shown in the  
3 following six domains: (1) acquiring and using information; (2)  
4 attending and completing tasks; (3) interacting and relating with  
5 others; (4) moving about and manipulating objects; (5) caring for  
6 self; and (6) health and physical well-being. 20 C.F.R.  
7 §§ 416.926a(b)(1)(i-vi) (2001).

8 In making a determination of disability, the ALJ must develop  
9 the record and interpret the medical evidence. *Howard ex rel. Wolff*  
10 *v. Barnhart*, 341 F.3d 1006, 1011-12 (9th Cir. 2003). The ALJ must  
11 consider the "combined effect" of all the claimant's impairments  
12 without regard to whether any such impairment, if considered  
13 separately, would be of sufficient severity. *Id.* (citing 20 C.F.R.  
14 § 416.923).

#### 15 **ADMINISTRATIVE DECISION**

16 At step one, the ALJ found Plaintiff had never engaged in  
17 substantial gainful activity. (Tr. 25). At step two, the ALJ found  
18 Plaintiff had severe impairments of limited intellectual functioning  
19 and a learning disorder due to language confusion. (Tr. 20, 25).  
20 However, the ALJ concluded that Plaintiff did not have defiance  
21 disorder, disruptive behavior disorder, oppositional disorder, ADHD,  
22 or ADD. (Tr. 20). At step three, the ALJ found that Plaintiff's  
23 impairments did not meet, medically equal, or functionally equal the  
24 criteria for any listed impairment. (Tr. 20, 25). The ALJ further  
25 found that Plaintiff's mother was less than credible. (Tr. 25).

**STANDARD OF REVIEW**

The Court may set aside an ALJ's denial of benefits when the ALJ's findings are based on legal error or are not supported by substantial evidence. *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is more than a mere scintilla, but less than a preponderance of the evidence. *Id.* at 1098. "Put another way, substantial evidence is such relevant evidence as a reasonable mind might accept as sufficient to support a conclusion." *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001) (citing *Richardson v. Perales*, 402 U.S. 389, 401, 91 S.Ct. 1420, 28 L.Ed.2d 842 (1971)). If the evidence is susceptible to more than one rational interpretation, the Court may not substitute its judgment for that of the ALJ. *Tackett*, 180 F.3d at 1098. However, on review, the Court must "consider the record as a whole, weighing both evidence that supports and evidence that detracts from the [ALJ's] conclusion." *Id.* (citing *Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993)).

**ISSUE**

The question presented is whether there was substantial evidence to support the ALJ's decision denying benefits and, if so, whether that decision was based on proper legal standards. Plaintiff challenges the ALJ's analysis at step two and step three in the sequential process. Specifically, Plaintiff asserts the ALJ erred by rejecting the opinion of the non-examining medical expert, Emma Billings, Ph.D.

**ANALYSIS**

At the first hearing, Dr. Billings diagnosed Plaintiff with ADHD and conduct disorder or oppositional defiant disorder. (Tr. 46). Dr. Billings also noted several limitations. (Tr. 49, 50). The record was held open because the school was performing some more tests that Dr. Billings and the ALJ both hoped would clarify Plaintiff's impairments.

At the second administrative hearing, Dr. Billings opined that Plaintiff *met* the listing for ADHD, Listing 112.11. (Tr. 71). Dr. Billings also opined that Plaintiff's impairments *functionally equaled* the listing because Plaintiff had marked limitations in two domains of functioning: (1) acquiring information and speech; and (2) attending and completing tasks. (Tr. 71). Either of Dr. Billings' conclusions would require a finding of disability under the Regulations. However, the ALJ rejected Dr. Billings' findings.

At step three, the ALJ initially concluded Plaintiff's impairments did not meet or medically equal any listing. However, in reaching this conclusion, the ALJ incorrectly stated that "[t]he medical expert testified that the claimant does not medically meet the criteria of any listing under Section 112.00. I concur ...." (Tr. 20). Thus, the ALJ committed legal error in asserting that Dr. Billings testified that Plaintiff did not meet the listing when in fact, Dr. Billings testified that Plaintiff met the listing for ADHD, requiring a finding of disability.

At step three, the ALJ further concluded that Plaintiff's

1 impairments did not functionally equal any of the listings, even  
2 though Dr. Billings opined that Plaintiff's impairments functionally  
3 equaled the listing for ADHD. (Tr. 23, 71). Dr. Billings based her  
4 opinion on Plaintiff's language and attentional difficulties and  
5 marked limitations in two domains of functioning: acquiring  
6 information and speech, and attending and completing tasks. (Tr. 23,  
7 71). The ALJ rejected Dr. Billings' conclusion and refused to accept  
8 her findings, stating:

9 I note that the various diagnoses of ADD and ADHD appear to  
10 be based on reports by Mrs. Martinez, the claimant's  
11 mother, regarding the claimant's behavior at home. Other  
12 than this, I find no objective evidence to support either  
13 of these diagnoses. Having found Mrs. Martinez an  
14 incredible witness, I do not accept the medical expert's  
15 testimony and find that the claimant does not have any  
16 marked limitations.

17 (Tr. 23).

18 The ALJ appears to have rejected Dr. Billings' opinions that  
19 Plaintiff's impairments functionally equaled the listing for ADHD  
20 because there was "no objective evidence" to support this diagnosis  
21 and because this diagnosis was "based on the reports" of Plaintiff's  
22 mother. However, the Court notes that Dr. Billings' diagnosis was  
23 not based on reports from Plaintiff's mother, but rather, it was  
24 based on reports from teachers and Plaintiff's examining  
25 psychologists: Dr. Whitmont and Dr. Worsley. (Tr. 44).  
26 Furthermore, the record is replete with objective evidence that  
Plaintiff has attention deficits.

After reviewing the entire record, including the tests performed  
by Plaintiff's school in 2002 after the first administrative hearing,

1 Dr. Billings concluded that Plaintiff "definitely has some learning  
2 disabilities" and is "in the borderline range as far as ... IQ's  
3 concerned." (Tr. 66). Dr. Billings specifically noted that the  
4 school records were consistent with ADHD: Plaintiff does "better  
5 under one on one with close supervision" because "there's less  
6 distractions and there's more attention paid". (Tr. 68). Dr.  
7 Billings explained Plaintiff's ADHD diagnoses: Plaintiff's ADHD is  
8 "manifested by hyperactivity, impulsiveness, which may account for  
9 some of the disruptive behaviors, difficulty maintaining attention  
10 and focus, and concentration problems." (Tr. 69).

11 The reports from Plaintiff's two examining psychologists also  
12 support Dr. Billings' ADHD diagnosis. In July 1998, Dr. Worsley  
13 performed a disability evaluation of Plaintiff and personally  
14 observed several abnormal behaviors "consistent with hyperactivity  
15 and attention deficits." (Tr. 290). In February 1999, Dr. Whitmont  
16 diagnosed Plaintiff with Attention Deficit Disorder as well as  
17 educational and developmental problems. (Tr. 295). It appears that  
18 the ALJ rejected the reports from Plaintiff's psychologists.  
19 However, the ALJ did not provide any explanation for doing so.  
20 Opinions of treating or examining physicians, even if contradicted by  
21 another doctor, can only be rejected for specific and legitimate  
22 reasons that are supported by substantial evidence in the record.  
23 *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995) (citing *Andrews v.*  
24 *Shalala*, 53 F.3d 1035, 1043 (9th Cir. 1995)). The Court determines  
25 the ALJ erred in rejecting the reports from Plaintiff's examining  
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1 psychologists without providing specific and legitimate reasons for  
2 doing so.

3 It also appears the ALJ overlooked Plaintiff's special education  
4 teacher, Julia Harmia, who performed several studies on Plaintiff in  
5 October and November of 2002. (Tr. 274-75). Based on her  
6 observations, Ms. Harmia completed check sheets from Dr. Daniel  
7 Amen's A Teacher's Guide to A.D.D. and noted a number of applicable  
8 traits indicating ADD. (Tr. 275-81). Ms. Harmia specifically  
9 identified Plaintiff as having ten symptoms indicative of ADD without  
10 hyperactivity, even though only six are required to reach a diagnosis  
11 of ADD. (Tr. 278).

12 Dr. Billings opined that Plaintiff had marked limitations in his  
13 ability to acquire information, noting that Plaintiff "is at two-  
14 thirds of the level of his language...his language development is  
15 equivalent to that of an eight year old [in both Spanish and  
16 English]." (Tr. 71). However, the ALJ rejected this opinion,  
17 concluding that "the file provided little satisfactory measure, given  
18 the language difficulties that interfere with valid testing." (Tr.  
19 24).

20 The ALJ seems to have rejected Dr. Billings' conclusion that  
21 Plaintiff had marked limitations in his ability to acquire  
22 information in language on the basis that Plaintiff's IQ testing was  
23 invalid. However, Plaintiff's school trusted the testing enough to  
24 conclude that Plaintiff had an IQ of somewhere between 70 and 80.  
25 Furthermore, Dr. Billings explicitly agreed with that finding. She  
26



1 concluded Plaintiff had a "lower borderline" I.Q. within the range of  
2 73 to 83. (Tr. 67-68). Moreover, when the ALJ questioned Dr.  
3 Billings specifically about the validity of the I.Q. testing in light  
4 of Plaintiff's apparent language difficulties, Dr. Billings testified  
5 Plaintiff's language problems could not account solely for his low  
6 I.Q. scores. (Tr. 66). Because the ALJ failed to point to any  
7 evidence in the record supporting his conclusion that the I.Q.  
8 testing was invalid and unreliable, the Court determines the ALJ  
9 erred in failing to provide adequate reasons for rejecting Dr.  
10 Billings' conclusion that Plaintiff had marked limitations in the  
11 domain of acquiring information and speech.

12 Although Dr. Billings further opined that Plaintiff had marked  
13 limitations in the domain of "attending and completing tasks", the  
14 ALJ summarily dismissed this diagnosis, concluding instead that  
15 Plaintiff's difficulties in these areas were "volitional" rather than  
16 a result of ADD. Specifically, the ALJ stated:

17 Even though the claimant has some trouble staying on task,  
18 a review of the recent school reports show that this is as  
19 much volitional as attentional. The claimant simply does  
20 not do the work at home or at school, as opposed to being  
21 unable to do it. The school seems to think his problem is  
22 psychosocial due to the claimant's mother and his home  
23 life, and I have little reason to doubt this.

24 (Tr. 24).

25 A review of the record shows no support for the ALJ's finding  
26 that Plaintiff's problems are psychosocial and resulting from his  
27 mother and home life. In fact, there is nothing in the record to  
28 show that the school actually believes this either. Furthermore,

1 although the ALJ attributed Plaintiff's inability to attend to and  
2 complete tasks to a matter of volition, one of the textbook symptoms  
3 of ADD is that a child often "appears to be apathetic or  
4 unmotivated". (Tr. 278). Thus, the ALJ denied Plaintiff's claim  
5 based on the fact that Plaintiff actually exhibited one of the  
6 symptoms of his alleged disability. According to the DSM-IV, persons  
7 with ADD and/or ADHD "often do not follow through on requests or  
8 instructions and fail to complete schoolwork, chores, or other  
9 duties." DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, FOURTH EDITION  
10 (DSM-IV), at 78 (1995). Further, it explains:

11 Tasks that require sustained mental effort are experienced  
12 as unpleasant and markedly aversive. As a result, these  
13 individuals typically avoid or have a strong dislike for  
14 activities that demand sustained self-application and  
15 mental effort or that require organizational demands or  
16 close concentration (e.g., homework or paperwork).

17 *Id.*

18 The ALJ did not provide any explanation of how he determined  
19 that Plaintiff's failure to attend to and complete tasks was  
20 volitional rather than a symptom of an impairment. Furthermore, the  
21 record provides no support for this finding. Rather, as Dr. Billings  
22 concluded, the behavior described in the record by Plaintiff's  
23 mother, teachers, and doctors fits this description. Therefore, the  
24 Court concludes that the ALJ erred in summarily dismissing Dr.  
25 Billings' conclusion that Plaintiff had marked limitations in the  
26 domain of attending and completing tasks without developing the  
record to address the ALJ's conclusion that Plaintiff's problems were  
volitional.

**CONCLUSION**

The ALJ erred in asserting that Dr. Billings testified that Plaintiff did not meet the listing when in fact, Dr. Billings testified that Plaintiff met the listing for ADHD, Listing 112. The ALJ also committed legal error in rejecting Dr. Billings' uncontroverted medical opinion without explanation. See, e.g., *Smolen v. Chater*, 80 F.3d 1273, 1282, 1286, 1288 (9th Cir. 1996) (finding legal error where ALJ ignored medical evidence of claimant's impairments and additional legal error where ALJ rejected uncontradicted opinion of physician without developing the record); *Cotton v. Bowen*, 799 F.2d 1403, 1408-09 (9th Cir. 1986) (finding legal error where ALJ's findings completely ignored medical evidence without giving specific, legitimate reasons for doing so), *superceded by statute on another point as stated in Bunnell v. Sullivan*, 912 F.2d 1149 (9th Cir. 1990). Further, the ALJ erred in failing to provide adequate reasons for rejecting Dr. Billings' conclusion that Plaintiff had marked limitations in the domain of acquiring information and speech. Furthermore, the ALJ erred in summarily dismissing Dr. Billings' conclusion that Plaintiff had marked limitations in the domain of attending and completing tasks without explanation or further development of the ALJ's conclusion that Plaintiff's limitations in this domain were volitional. For the foregoing reasons, the Court determines that the ALJ's decision denying Plaintiff disability benefits was not supported by substantial evidence. Accordingly, the Court grants Plaintiff's

1 motion for summary judgment, and denies Defendant's motion for  
2 summary judgment.

3 **AWARD OF BENEFITS**

4 The Court has some flexibility in determining whether to remand  
5 for an immediate award of benefits or for additional administrative  
6 proceedings. *Connett v. Barnhart*, 340 F.3d 871, 876 (9th Cir. 2003).  
7 Remand for additional proceedings is appropriate if enhancement of  
8 the record would be useful. *Benecke v. Barnhart*, 379 F.3d 587, 593  
9 (9th Cir. 2004). However, where the record has been developed fully  
10 and further administrative proceedings would serve no useful purpose,  
11 the Court should remand for an immediate award of benefits. *Id.* An  
12 immediate award of benefits is required when "(1) the ALJ has failed  
13 to provide legally sufficient reasons for rejecting [a medical  
14 opinion], (2) there are no outstanding issues that must be resolved  
15 before a determination of disability can be made, and (3) it is clear  
16 from the record that the ALJ would be required to find the claimant  
17 disabled were such evidence credited." *Harman v. Apfel*, 211 F.3d  
18 1172, 1178 (9th Cir. 2000). However, remand is not appropriate for  
19 the sole purpose of permitting the ALJ to make specific findings  
20 regarding the improperly rejected testimony. *Benecke*, 379 F.3d at  
21 593. Rather, such evidence should be credited as true. *Id.* (citing  
22 *Varney v. Secretary of Health and Human Services*, 859 F.2d 1396, 1399  
23 (9th Cir. 1988) and *Reddick v. Chater*, 157 F.3d 715, 728 (9th Cir.  
24 1998)).

25 Because the ALJ failed to provide legally sufficient reasons for  
26

1 rejecting Dr. Billings' uncontroverted medial opinions, the Court  
2 credits Dr. Billings' conclusions as true. As discussed previously,  
3 either Dr. Billings' conclusion that Plaintiff met Listing 112.00 for  
4 ADHD, or Dr. Billings' conclusion that Plaintiff functionally equaled  
5 the listing because he had marked limitations in two domains would  
6 have required a finding of disability. Therefore, the Court  
7 determines an immediate award of benefits is required. Accordingly,

8 **IT IS HEREBY ORDERED:**

9 1. Plaintiff's Motion for Summary Judgment, **Ct. Rec. 9**, is  
10 **GRANTED.**

11 2. Defendant's Motion for Summary Judgment, **Ct. Rec. 12**, is  
12 **DENIED.**

13 3. Judgment shall be entered for Plaintiff. The Commissioner  
14 shall make an immediate award of benefits based on the onset date  
15 noted in the applications.

16 **IT IS SO ORDERED.** The District Court Executive is hereby  
17 directed to enter this Order, furnish copies to counsel, and  
18 thereafter **CLOSE THE FILE.**

19 **DATED** this 20th day of June, 2005.

20  
21 s/ Fred Van Sickle  
Fred Van Sickle  
22 Chief United States District Judge  
23  
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